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NTSB Order No. EA-4978

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of June, 2002

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. RADHA ABIRAMAN, Respondent.	Docket SE-15813

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge William A. Pope, II, issued on December 8, 2000, following an evidentiary hearing.[1] The law judge dismissed an order of the Administrator, on finding that the Administrator had failed to meet her burden of proving that respondent had violated 14 C.F.R. 91.123(b) and 91.13(a) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91) in

[1] The initial decision, an excerpt from the transcript, is attached.

connection with a banner-towing flight on February 15, 1999.[2] We grant the appeal and remand for further proceedings in accordance with this decision.

To reach the beach area over which respondent was to tow her banner, her aircraft needed to pass through Class C controlled airspace surrounding Sarasota (Florida) Airport. To do so, she was not required to obtain ATC permission. Instead, she was only required to establish two-way radio contact. Once ATC acknowledged her, she was authorized to "transition" the controlled space. ATC technique, apparently, is to, in effect, deny permission to enter by simply refusing to acknowledge aircraft call-outs.

The Administrator offered the testimony of the local controller and his supervisor to the effect that, in response to respondent's third call-in (the first two having gone unanswered due to work volume), she was directed to remain clear of the area (in this case, a 5-mile circle around the airport). She failed to do so, whereupon she was assigned a discrete call sign so that she could be more accurately tracked, and was given instructions, which she followed, as to how to leave the area. In contrast, respondent testified that ATC had acknowledged her call and only later directed that she remain clear. She further testified that

[2] Section 91.123(b) provides that, except in an emergency, no person may operate an aircraft contrary to an ATC (Air Traffic Control) instruction in an area in which air traffic control is exercised. Section 91.13(a) prohibits careless or reckless operations so as to endanger the life or property of another.

she did not believe that she had entered the controlled airspace. Review of the radar data, as testified to by the automation specialist who collected and analyzed it shortly after the event, indicated, however, that respondent had entered the Class C airspace.[3]

The key issue was whether or not ATC had acknowledged respondent, thus establishing the two-way radio communication required for her to pass through the area. The law judge did not make specific credibility findings to resolve the conflicting testimony. Instead, his decision in respondent's favor relied on two factors that we think were inappropriately used here. First,

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[3] The Administrator was prepared to introduce the radar plot. However, the law judge had excluded all exhibits by both parties based on their perceived failure to comply with his pre-hearing order. We think there were other, more appropriate options, had he been willing to explore the notice issue.

The law judge's order required that the parties exchange exhibits no later than 21 days prior to the hearing. At the hearing, the Administrator represented that prior counsel for the Administrator had timely served both the law judge and respondent with all exhibits in the form of portions of the Enforcement Investigative Report. Respondent's (new) counsel did not contend that respondent had not received these documents or that he had not had the opportunity to review them. He was ostensibly concerned with their legibility and that he possibly did not have a complete file, but his letter to the Administrator's counsel advising of his concern was not received until she had left for the hearing. Thus, the Administrator had no reason to believe there was any problem. The law judge also apparently objected to the items not being organized or marked as his order directed. Transcript (Tr.) at 25-26.

The law judge could easily have recessed the hearing to allow the parties to review documents, and he then could have dealt with any notice objections on a document-by-document basis. Nor do we see a simple failure to number exhibits a legitimate basis to reject them. There was no proof, or even a request by the law judge for such a showing, that respondent would have been prejudiced by admission of the Administrator's exhibits.

the law judge drew an adverse inference against the Administrator based on the FAA's admitted loss of the tower audiotape. Second, the law judge relied on pleading statements by the Administrator's prior counsel, which were read to support respondent's argument that she had received the necessary acknowledgement, but that permission to transit the area had later been taken away. We do not believe that the law judge's approach to resolving this case produced the balanced resolution based on a thorough review of the evidence to which all parties, including the Administrator, are entitled.

Clearly, had the tape of the conversations been available, the case would have been short work. As the law judge noted, however, our precedent does not require the Administrator to present the audiotape to prevail.[4] While it may be the best evidence of what happened, it is certainly not the only evidence. Furthermore, the simple fact that it is lost should not, absent more, direct any adverse inference. We would not be unwilling to consider drawing such an inference if there were some evidence of malfeasance in the loss by way of purposeful destruction of evidence, but here there is not even an allegation, nor any proof, that anything inappropriate occurred.

Similarly, we find the law judge's reliance on prior counsel's statements unreasonable in this case. As the

[4] Most cases note that a respondent may also request that the tape be preserved. That was a moot point here, as the relevant portion of the tower tape was copied, but lost later in the investigation process.

Administrator noted, these statements are not evidence. And, while such statements can certainly be damaging to the Administrator's case, the record in this case is so replete with changing theories and changing versions of events that we do not think reliance on those statements presents the best opportunity to discern the truth in this case.

In her answer, respondent admitted entering the Class C airspace. In her testimony, she denied doing so. In her written response to the letter of investigation (Exhibit A-1), she makes no mention of any ATC acknowledgment. In her testimony, she states that she received an acknowledgment that was later withdrawn. Her testimony of the route she flew and her reaction to ATC actions are not easily understood and can be read as inconsistent with a belief that she had received permission to transit the controlled airspace. The two tower controllers testified that her radio calls were never acknowledged by them, that their first conversation was to tell her to remain clear, and that she then apologized. Tr. at 101. Why counsel for the Administrator had earlier represented that she was given an acknowledgment that was then immediately withdrawn cannot be determined on this record.[5] Nevertheless, rejecting the

[5] Respondent suggested that these statements came from the controller's deposition testimony. Tr. at 226. Although it is not a part of the record under consideration, we have reviewed that testimony for this limited purpose, and it does not so state. Counsel for the Administrator may have misread or misunderstood the controller's statements (see deposition of Randolph William Drose at 35).

testimony of two controllers requires more than a simple statement that their testimony is not “convincing” and not “sufficient.” To ensure a fair hearing, we think due process required the law judge squarely to face the many conflicts and inconsistencies in the testimony, and to resolve them directly through detailed findings of fact that thoroughly consider and review all the conflicting evidence and include specific credibility findings that are supported with logical and reasoned explanations.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator’s appeal is granted; and

2. This case is remanded to the law judge for further proceedings consistent with this decision.

BLAKEY, Chairman, CARMODY, Vice Chairman, and BLACK, Member of the Board, concurred in the above opinion and order. HAMMERSCHMIDT and GOGLIA, Members, did not concur, and Member GOGLIA submitted the following dissenting statement, in which Member HAMMERSCHMIDT joined.

I dissent.

> The air traffic control voice tape and radar data was preserved by request of the Respondent immediately after the event. This was the only evidence that would conclusively exonerate Respondent. It was lost or misplaced by the FAA. According to testimony, either flight standards, air traffic or legal was responsible for losing the evidence, but only flight standards testified that it conducted a search. Lost, missing or destroyed evidence or documents, whether lost or shredded by the parties or counsel or accountants, empowers the Administrative Law Judge to impose severe sanctions, to establish inferences that the missing evidence would have been favorable to Respondent, or to dismiss the charges.

Counsel for the Administrator also stated in a Response to a Pre-Hearing Motion "There is no dispute that the Respondent radioed Sarasota ATCT prior to entering Class Charlie airspace and that the Sarasota ATCT acknowledged her, that she had permission to enter the Class C airspace." At trial, a different counsel represented the Administrator. The second counsel took the opposite position, that Respondent did not have permission to enter Class C airspace. Second Counsel argues that the Administrative Law Judge erred in according weight to sworn representations by the Administrator's first counsel because air traffic controller testimony was contrary to first counsel's pleading. It is unclear that the Administrative Law Judge has the discretion to weigh the statements of witnesses and sworn pleadings of counsel and decide how much weight to give to each.

There were other issues in this case regarding compliance by the Administrator with the pre-trial order. The Administrator's counsel contended that the production of the EIR and other documents to the Respondent was compliance with the Administrative Law Judge's pre-hearing order. On the other hand, Respondent's counsel claimed that the rules require an exchange of exhibits between parties and that when a party is represented by counsel, then the exchange must be between counsel. Respondent's counsel also noted that the copies that were sent to Respondent were illegible. Counsel for the Administrator also claimed that the Respondent's objections were not received by the Administrator. These are the kinds of disputes that are clearly within the Administrative Law Judge's discretion to resolve by exclusion of the evidence of either party, including the exclusion of the evidence presented by the Administrator's counsel. Administrator v. Wagner, NTSB Order No. EA-4081.

I would affirm the ALJ, and the Board's rules and precedent that clearly establish the following:

1. NTSB Rule of Practice 821.19(d) provides that the failure to preserve evidence may result in a negative inference against that party.

2. Statements of a party's counsel in pleadings are binding on that party.

3. Administrative Law Judges have the discretion to determine the credibility of witnesses, and the Administrator's witnesses do not have any presumption

of credibility, or any other inherent inference that their testimony is more credible than the testimony of any other witness.

4. Administrative Law Judges have the discretion to exclude evidence or dismiss the charges, based on the failure of the Administrator’s counsel to properly serve documents in accordance with the pre-trial order.